

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:)
)
MICHAEL B. HREJSA) CASE NO. 09-40550
TRINA MARIE HREJSA)
)
Debtors)

DECISION ON TRUSTEE'S MOTION FOR POST-CONFIRMATION MODIFICATION

At Fort Wayne, Indiana, on July 21, 2010

This case is pending under Chapter 13 of the United States Bankruptcy Code. Under their confirmed plan the debtors are to pay the trustee \$1,510.64 per month. In his annual review of the case and of the financial information debtors periodically submit, the trustee discovered the debtors' income had increased substantially from what it was when the case was originally filed: up from approximately \$60,000 per year to more than \$72,000. As a result, he contacted debtors' counsel advising him of the fact and that the plan should be modified in light of the change or the debtors should submit amended Schedules I and J reflecting that, notwithstanding the increase in gross income, there had been no change in their disposable income. Debtors did not respond to this inquiry, and so the trustee filed a motion asking the court to modify the plan to increase the debtors' monthly payments by \$300.00, raising them to \$1,810.64. The debtors objected to the modification. Notwithstanding their failure to respond to the trustee's original inquiry concerning changes in expenses, they claim that many of their expenses had increased from the date the case was filed, in particular their expenses for food and medical care, and that these increases exceed the increase in their income. The matter is before the court following trial of the issues raised by the trustee's motion and the debtors' objection thereto.

Chapter 13 plans last three to five years, unless unsecured creditors can be paid in full in less time. See, 11 U.S.C. § 1325(b)(4). Yet few things remain constant during this period of time: things happen and circumstances change. That is one reason § 1329 allows for the modification of a plan after it has been confirmed, and the trustee is one of the entities authorized to seek modification. 11 U.S.C. § 1329(a) (plan may be modified “upon request of the debtor, trustee, or the holder of an allowed unsecured claim”). Modification may be sought at any time, so long as the payments under the plan have not been completed. 11 U.S.C. § 1329(a). See also, Matter of Witkowski, 16 F.3d 739 (7th Cir. 1994). Whether or not the plan is modified is a matter committed to the court’s discretion. Witkowski, 16 F.3d at 748. See also, In re Brown, 332 B.R. 562, 565 (Bankr. N.D. Ill. 2005).

Just as there is little debate that a decrease in income may call for modifying a plan to reduce a debtor’s payments to the trustee,¹ there is no dispute that an increase in income may call for an increase in those payments. Similarly, there is no dispute that the debtors’ net take home pay has increased to \$4,553.00 a month, \$1,143.00 more than the take home pay upon which their original plan payments were premised. The dispute involves the debtors’ claims that their expenses have increased by more than the increase in their income. As the proponents of the issue, as well as the party with the easiest access to that type of information, the debtors bear the burden of proving such an increase. See, United States v. New York, New Haven & Hartford Railroad Co., 355 U.S. 253, 78 S.Ct. 212, 215 n.5 (1957) (“The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.”); United States v. Denver & Rio Grande Railroad Co., 191 U.S. 84, 24 S.Ct. 33, 35 (1903) (“...[I]t is

¹The alternative is that debtors would default and the case would fail, resulting in conversion or dismissal.

manifestly just and reasonable that the party which is in possession of the proof be required to adduce it...”). It is in the nature of a affirmative defense, so to speak, to the trustee’s motion. In re Rusty Jones, Inc., 110 B.R. 362, 373 (Bankr. N.D. Ill. 1990) (objector to plan has burden of proof on affirmative defenses to confirmation); In re Rasbury, 130 B.R. 990, 1001 (Bankr. N.D. Ala. 1991). Nonetheless, the trustee bears the ultimate burden of persuading the court that the proposed modification is justified. Brown, 332 B.R. at 564.

When the court first considers confirmation of a plan, it is given detailed information concerning a debtor’s income and expenses. This information is submitted in connection with the initial bankruptcy filing, through Schedules I and J. Ideally, the court would receive the same type of detailed information if it is subsequently called upon to consider whether a confirmed plan should be modified and there is a dispute concerning either the debtors’ income or their reasonable living expenses. Unfortunately, the court has not been given that type of information here, despite the fact that, on February 5, 2010, in his original communication with debtors’ counsel on the issue, the trustee requested amendments to both Schedules I and J. It was the debtors’ failure to do so that prompted the trustee to file the present motion. Furthermore, notwithstanding their objection to the motion and their contention that expenses have increased beyond those originally scheduled, the debtors did not submit an amended Schedule J in connection with their response, or at any time thereafter. At no time prior to or during the trial of this matter have the debtors provided either the court or the trustee with a detailed overview of all of their current expenses. Instead, they have simply taken the position that some of their expenses have increased, and therefore modification is

not appropriate.²

Debtors' primary contention is that their medical expenses, particularly for prescription drugs, have increased significantly since the case was filed. The objection indicates that their medical expenses now average more than \$500.00 a month and Mrs. Hrejsa's testimony at trial was that they are paying \$400.00 a month for prescription medication. Yet the documentation submitted to corroborate this indicates that their out-of-pocket expenses for prescription drugs from December 1, 2009 through June 9, 2010 have totaled no more than \$642.00. See, Debtors' Exhibit B.³ Mrs. Hrejsa also testified to some rather large medical bills the debtors incurred since the date of the petition, or anticipate incurring in the near future, as a result of the uninsured portion of those expenses, deductibles and co-pays. Despite the debtors' contentions and testimony in this regard, the bills that were introduced into evidence for medical care do not corroborate the substantial expenses they contend they are facing. See, Debtors' Exhibit C. For example, they submitted a number of statements from Clarian-Arnett Health Clinic. The first of these, dated March 2, 2010, reflects total charges of \$1,732.00, yet, after insurance payments and other adjustments, the amount

²In closing arguments the court asked debtors' counsel why such an analysis had not been prepared or submitted to anyone during the five months which passed between the trustee's original e-mail and the date of trial. The court was surprised to learn that such an analysis, through amended Schedules I and J, had been prepared shortly before trial but was never offered into evidence. In light of the importance of this information to the issues before it, the court is more than a little perplexed by the absence. The court hopes that it was simply an oversight on the part of debtors' counsel and does not arise out of the fact that accurately amended Schedules I and J might reflect that the debtors do have the ability to increase their payments to the trustee, by at least the amount the trustee has sought. If that is the case, counsel might face a significant problem in connection with his opposition to the motion and his obligations under Rule 9011(a).

³To derive this number the court has totaled the information on the first page of that exhibit (\$130.00) with the total found on the fourth page of that exhibit (\$512.00) because the first page seems to reflect information from a pharmacy different from that on the final three.

the debtors are to pay was only \$150.00. Another statement from the Clarian-Arnett Clinic, this one dated March 1, reflects charges totaling \$419.00 in December 2009, yet after insurance and adjustments the debtors' responsibility was only \$110.00. Similarly, that clinic charged \$189.00 for treatments in April 2010, yet after insurance and other adjustments the debtors' balance due was only \$30.00. The same is true for a statement dated June 1, 2010, which reflects a balance due of \$50.00 as a result of treatment received on December 31, 2009. Furthermore, that particular bill seems to duplicate the \$50.00 charge for the December 31, 2009, office visit reflected on the March 1 statement. There is, however, a May 27 billing of \$1,678.78, from the Neurological Institute which reflects a balance predating December 8, 2009. When that treatment may have been received, what it was for, and the status of any pending insurance the court cannot tell. There is also a March 24, 2010, invoice from Advanced Pain & Anesthesia which begins by reflecting a balance of \$1,280.18, predating September 25, 2009, and then additional charges on account of office visits in November, January and February for which the debtors were required to pay only \$30.00 each. The other charges for those visits were fully paid through insurance and other adjustments. What the original balance of \$1,280.00 might be for is not known. Finally there is a billing from MiraMed Revenue Group, dated April 21, 2010, of \$150.00, apparently, representing an account turned over for collection from St. Elizabeth Regional Health. What these charges may represent, when they were incurred or why is not explained.

While debtor's medical expenses are not as significant as they would like the court to believe, it is clear that, since the petition, that the debtors have encountered a number of medical expenses they have had to pay out of their pocket, and counsel points to their original Schedule J which budgets nothing for medical and dental expenses. While that is true, the court also notes that

Schedule I indicates they were originally paying \$192.00 per month into some type of medical reimbursement account. As a result, the argument that debtors budgeted nothing for medical expenses is not entirely correct. They had budgeted at least \$2,304.00 a year ($\192×12); but the budgeted expense is reflected on Schedule I rather than Schedule J. The court understands that the debtors have discontinued that reimbursement account and this may account for some, although by no means all, of the increase in their monthly net income.

Debtors also point to the fact that they budgeted only \$50.00 a month for auto maintenance and repairs and contend that they have spent more than \$2,150.00 on car repairs this year alone. The exhibits they introduced into evidence do not corroborate that contention. See, Debtor's Exhibit A. That exhibit reflects only \$1,695.00 of charges that have been made to the debtors for automotive maintenance, and of that total \$329.23 is a duplication appearing on both the first and the third page of the exhibit. As a result, while the court may be willing to accept the proposition that the debtors actual automotive maintenance expenses exceed \$50.00 a month, it is not willing to accept the implicit contention that the expenses they have faced over the last six months are representative of the expenses they will face in the next six months and the six months after that, etc., etc., etc.

Another claimed increase in the debtors' expenses is food for their family of four. It was originally placed at \$400.00, or about \$100.00 per week. Mrs. Hrejsa's testimony was that their actual food expenses are now somewhat more than \$150.00 per week: approximately \$650.00 per month ($\$150 \times 52 \div 12$). Another additional expense that was not in the debtors' original Schedule J budget is a term life insurance policy they have chosen to acquire since confirmation, at a cost of \$43.00 a month.

Although Mrs. Hrejsa's direct examination focused exclusively on the additional expenses

the debtors claim they now confront, on cross-examination she acknowledged that some of their expenses have declined. For example, their cell phone charges are now \$60.00 per month, down from the \$100.00 originally budgeted in Schedule J. Additionally, the debtors no longer have their \$70.00 per month cable bill. These beneficial changes in their expenses should also be taken into consideration.

In considering whether the debtors' plan should be modified to increase their payments to the trustee, we can begin with the proposition that their net monthly income has increased by \$1,143.00. That increase is sufficiently large to justify considering modification. But, their expenses have also changed and those changes need to be considered, as well. We can start by providing something for medical expenses, by moving the \$192.00 a month deduction that was taken on their original Schedule I and use it to replace the originally budgeted \$0 for medical expenses on Schedule J. We can also increase debtors' expenses by \$250.00 per month to account for the increase in their food budget. They have, however, reduced their expenses by at least \$110.00 a month, on account of lower cell phone charges (down by \$40.00) and the lack of the cable bill (\$70.00). There is also the \$43.00 a month increase attributable to the new term life insurance policy. All of these changes result in a net increase in the debtors' monthly expenses of \$375.00. Subtracting that number from their increased income leaves \$768.00 yet to be accounted for, of which the trustee wants only \$300.00. Doing that still leaves the debtors more than \$450.00 per month from their increased income to pay for any increased medical expenses or automotive repairs the debtors believe they may have. Given the evidence that has been presented, that sum should be more than sufficient to the task. That is especially so since the debtors have had the undiminished benefit of their entire increased income throughout the latter part of 2009 and thus far through 2010.

The debtors' objections to the trustee's motion for post-confirmation modification are OVERRULED and that motion will be granted. An order doing so will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court